MOTION FILED
MAY 22 1995

Nos. 94-1749 & 94-1750

In the

Supreme Court of the United States

OCTOBER TERM, 1994

SEAN JONES, *et al.*,

Petitioners,

v.

REGGIE WHITE, *et al.*,

Respondents,

MARK DUSBABEK, *et al.*,

Petitioners,

v.

REGGIE WHITE, *et al.*,

Respondents.

PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF PUBLIC CITIZEN INC. IN SUPPORT OF CERTIORARI

Alan B. Morrison
(Counsel of Record)
Brian Wolfman
Public Citizen Litigation Group
Room 700, 2000 P Street NW
Washington D.C. 20036
(202) 833-3000

Attorneys for Public Citizen, Inc.

In the

Supreme Court of the United States

OCTOBER TERM, 1994

Nos. 94-1749 & 94-1750

SEAN JONES, *et al.*,

Petitioners,

v.

REGGIE WHITE, *et al.*,

Respondents,

MARK DUSBABEK, *et al.*,

Petitioners,

v.

REGGIE WHITE, *et al.*,

Respondents.

MOTION OF PUBLIC CITIZEN, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF CERTIORARI

Pursuant to Rule 37.2 of this Court, Public Citizen, Inc. hereby moves for leave to file the accompanying brief *amicus curiae* in support of these petitions. Both sets of petitioners have consented, as has the respondent National Football League and its member organizations. However, counsel for Reggie White and the plaintiff class has refused consent on the ground that the issue addressed in the accompanying brief is not properly presented as a result of the decision of the Eighth Circuit below.

Public Citizen is a nonprofit consumer organization, with approximately 88,000 members nationwide. Through its

Litigation Group, it has participated in a substantial number of class actions seeking money damages, generally, but not always, appearing on behalf of absent class members, such as the petitioners in these two cases. It filed briefs *amicus curiae* in this Court in the two central cases bearing on the issue presented by these petitions: *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359 (1994), in both cases urging the Court to analyze the issue using the Due Process test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). This brief will also take that approach, which is not suggested in either petition, although it was the principal focus of the briefing, but not the ultimate decision, in *Ticor*. In addition, this brief suggests an interim position, not proposed by any of the existing parties, with respect to the central issue of class certification. It urges that the claims for injunctive relief can be certified on a non-opt out basis, but that the claims for money damages can be certified only by allowing an opt out. It is because none of the existing parties is urging either of these positions that Public Citizen is filing this brief.

For the foregoing reasons, the motion for leave to file should be granted.

Respectfully submitted,

Alan B. Morrison
(Counsel of Record)
Brian Wolfman
Public Citizen Litigation Group
Room 700, 2000 P Street NW
Washington D.C. 20036
(202) 833-3000

Attorneys for *Amicus Curiae*
Public Citizen Inc.

May 22, 1995

ALTERNATIVE QUESTION PRESENTED

The following question is a combination and modification of questions 1, 2 and 9 in the petition in 94-1749 and questions 1 and 2 in 94-1750. *Amicus* believes that its question more precisely states the issue than does those questions. With respect to the other questions in the petitions, *amicus* believes that they are fairly comprised within the rephrased question, or, with respect to question 8 in 94-1749 and question 3 in 94-1950, do not warrant review.

In a federal antitrust action involving claims for both injunctive relief and individual claims for substantial money damages, may a federal court, consistent with Rule 23 and the Due Process Clause, certify a class and approve a settlement in which the individuals are not afforded a right to opt out on their claims for money damages?

TABLE OF CONTENTS

ALTERNATIVE QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS 1

BRIEF OF AMICUS CURIAE 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

CONCLUSION 16

TABLE OF AUTHORITIES

CASES **PAGE**

In re A.H. Robins Co., Inc., 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989) 9, 10

Brown v. Pro Football, Inc., 782 F. Supp. 125 (D.D.C. 1991), *reversed*, 1995 WL 115729 (D.C. Cir.) 6, 11

Brown v. Ticor Title Insurance Co., 982 F.2d 386 (9th Cir. 1992) . . . . . *passim*

In re Dennis Greenman Securities Litig., 829 F.2d 1539 (11th Cir. 1987) 10

Eisen v. Carlilse & Jacquelin, 417 U.S. 156 (1974) . . 11

Hansberry v. Lee, 311 U.S. 32 (1940) 13

Mathews v. Eldridge, 424 U.S. 319 (1976) 2, 14

McDonnell Douglas Corp. v. United States District Court for the Central District of Calif., 523 F.2d 1083 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976) 10

McNeil v. NFL, 1992-2 Trade Cas. (CCH ¶ 69,682)(D. Minn. 1992) 4, 7

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 13

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) . . . . . *passim*

Ticor Title Ins. Co. v. Brown, 114 S. Ct. 1359 (1994) 2, 8

MISCELLANEOUS

Federal Rules of Civil Procedure
23 . . . . . 2, 5, 9, 10, 11, 13
23(b)(1) 4, 5, 8, 10, 12, 13
23(b)(1)(A) 4, 5, 10, 14
23(b)(2) 5, 8, 12, 14
23(b)(3) 5, 10, 11, 12, 13, 15
23(c) 12
23(c)(2) 10, 11, 12
23(c)(2)(C) 11

In the

Supreme Court of the United States

OCTOBER TERM, 1994

Nos. 94-1749 & 94-1750

SEAN JONES, *et al.*,

Petitioners,

v.

REGGIE WHITE, *et al.*,

Respondents,

MARK DUSBABEK, *et al.*,

Petitioners,

v.

REGGIE WHITE, *et al.*,

Respondents.

BRIEF AMICUS CURIAE OF PUBLIC CITIZEN INC. IN SUPPORT OF CERTIORARI

INTEREST OF AMICUS

Public Citizen, Inc. is a nonprofit consumer organization, with approximately 88,000 members nationwide. Through its Litigation Group, it has participated in a substantial number of class actions seeking money damages, generally, but not always, appearing on behalf of absent class members, such as the petitioners in these two

cases. It filed briefs *amicus curiae* in this Court in the two central cases bearing on the issue presented by the petitions: *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359 (1994), in both cases urging the Court to analyze the issue using the Due Process test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). This brief will also take that approach, which is not suggested in either petition, although it was the principal focus of the briefing, but not the ultimate decision, in *Ticor*. In addition, this brief suggests an interim position, not proposed by any of the existing parties, with respect to the central issue of class certification. It urges that the claims for injunctive relief can be certified on a non-opt out basis, but that the claims for money damages can be certified only by allowing an opt out. It is because none of the existing parties is urging either of these positions that Public Citizen is filing this brief.

STATEMENT OF THE CASE

The fundamental issue raised by these petitions is how federal courts should reconcile the interests of individual class members and the class as a whole when a class complaint seeks both injunctive relief and substantial money damages. In particular, the issue, which has engendered considerable confusion in the lower courts, is whether a right to opt out must be accorded where both injunctive relief and substantial money damages are sought.

There are two polar positions, which we reject, and a middle ground which we support. On one end of the spectrum is the position adopted by the district court: in cases seeking "predominately" injunctive relief, there is no right to opt out. On the other end is the position that, if there are substantial claims for money damages, the class members must be given an opt out as to all claims. Our position is in the middle: there need be no opt out for the injunctive relief claims, but Rule 23 and the Due Process

Clause require an opt out for substantial individual claims for money damages. Before explaining how we arrive at that result and why review is warranted, it is necessary to highlight certain facts regarding these proceedings that are not fully set forth in the petitions.

After a series of antitrust actions against the respondent National Football League ("NFL") by present and former players were filed, and in some cases tried, this action was filed in the District of Minnesota on September 21, 1992, as a class action, initially seeking only injunctive relief. The basic claim was that certain NFL practices regarding player contracts—restrictions on players moving from one club to another (known as Plan B), the college draft, the standard NFL player contract, and the pre-season pay rules—violated the federal antitrust laws. The complaint sought an order directing the NFL to restructure its rules so as not to violate those laws. Thereafter, the complaint was amended to add a separate class claim for money damages, which are trebled under the antitrust laws.

In early 1993, a settlement was reached on the injunctive and damages claims, both on a class-wide basis, with certain limited exceptions described below. The class included all current and former NFL players (back to August 31, 1987), as well as all future college players who might seek to play in the NFL. Since the agreement essentially rewrote the rules governing the relationship between the NFL and the players—present, past,and future— the named parties insisted, and we agree (although petitioners may not), that the injunctive class had to include everyone, with no right to opt out: there had to be one set of rules for everyone if there was to be a contract at all between the NFL and the players.

As part of the settlement, the League naturally wanted to resolve all of the pending claims for money damages against it, as well as any other claims that might be brought thereafter relating to its prior rules. Thus, the class was defined to include all former, present, and future NFL

players who had any claims dating from August 31, 1987, to the date of the final approval of the settlement. Although all present and future players would be bound by the structural changes, there was less than complete identity between those class members governed by the injunctive relief and those who were theoretically eligible to sue for damages.

First, college athletes, who had yet to seek to play in the NFL, plainly had no claim for damages for conduct occurring while they were still in college. Second, some of the players who had damages claims were no longer in the League, and hence the new rules on player contracts, as well as benefits, such as injury protection, worker's compensation, and moving and travel expenses, would be irrelevant to them. Third, there were certain key dates, the most significant being November 6, 1989, when the National Football League Players Association ("NFLPA") ceased being the certified bargaining agent of the players, after which the NFL's antitrust defenses based on the prior collective bargaining agreement were seriously weakened. Fourth, some of those current players who were eligible to file damages claims might have unique defenses applicable to them, such that they might benefit only from the injunctive relief, or they might have varying degrees of difficulty in proving money damages.[1]

Despite these differences in class composition, the court nonetheless certified a single class, with no subclasses, under the mandatory provisions of Federal Rule of Civil Procedure 23(b)(1). In doing so, it relied principally on subpart (A) of that Rule, which provides for non-opt out classes where "the prosecution of separate actions by or against individual

---

[1]For example, in *McNeil v. NFL*, 1992-2 Trade Cas. (CCH ¶ 69,682)(D. Minn. 1992), the jury found that the NFL had violated the antitrust laws, but four players were awarded *no* damages, and four others were awarded damages ranging from $50,000 to $240,000, before trebling. Pet. App. 183, n.14.

members of the class would create a risk of . . . inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class ... ." There is no question that "inconsistent or varying adjudications" (or settlements) concerning the rules establishing the relationships between players and the League over contract matters would be possible, perhaps even likely, if class members were entitled to opt out and litigate the claims for structural relief on an individual basis. Thus, there is no legitimate basis for challenging the non-opt out class certification on that aspect of the case.

But petitioners also objected to the denial of an opt out for their individual claims for money damages. The district court recognized that the class could also have been certified under Rule 23(b)(3), which contains an absolute right to opt out for each class member, but ruled that, where both (b)(1) and (b)(3) certifications are available, the proper course to follow is to certify the class under (b)(1). Pet. App. 216-17. *Amicus* agrees that claims for injunctive relief, particularly such as those seeking the kind of structural relief accorded here, which essentially rewrote the basic contractual relationship between the players and the League, are not required either by Rule 23 or Due Process to allow class members to opt out.

Although we agree that the district court properly certified the injunctive aspects of this case under Rule 23(b)(1), and could also have relied on Rule 23(b)(2), neither provision has anything to do with substantial damages claims, such as those alleged by petitioners here. Damages claims plainly do not meet the requirements of subsection (b)(1)(A) since, even if they yielded "inconsistent or varying adjudications," they do not create "incompatible standards of conduct" for the defendant, except that some claimants receive compensation and others do not. Nonetheless, as a result of the district court's decision to certify both injunctive claims and damages claims under Rule 23(b)(1), petitioners

were denied their right to opt out and instead were forced to accept the formula for damages provided in the settlement agreement, even though they believed that could obtain more money, either in settlement or after trial, in their own antitrust cases which were already pending in other courts for all but two of the petitioners.

One other aspect of the settlement bears noting in connection with the claim by the settling parties that opt outs could not be permitted for damages claims. The agreement itself contained a formula for the payment of damages to class members based on the effects of Plan B on them, and a pool of money to be divided among those who claimed injuries based on price fixing for pre-season pay. However, the agreement also creates a series of exceptions, both for the named plaintiffs in this litigation and the named parties in some other cases against the NFL—those supported by the Players Association—but not those which these petitioners had filed. Pet. App. 231-34. Those exceptions created entirely separate payment plans for their beneficiaries that were far more generous than the basic settlement. While that does not prove that they are improper, it does make clear that any claimed need for an all-inclusive settlement, with a single payment plan, is insupportable.

Even more damning is the exclusion, from any agreement on damages, of the entire case of *Brown v. Pro Football, Inc.*, 782 F. Supp. 125 (D.D.C. 1991), which had been tried and was then on appeal to the District of Columbia Circuit and was just recently reversed. 1995 WL 115729 (D.C. Cir.). If that case could be excluded from a global settlement, there was no reason in principle why those cases in which petitioners were involved, or other cases that might be filed by others who would have liked to have opted out, could not have been allowed to go forward on their own,

either to judgment or settlement, instead of being bound by the formula in the settlement agreement.[2]

Despite all of these differences among class members, the district court certified a single class and then precluded any class member from opting out. Petitioners' appeal to the Eighth Circuit focussed on the lack of an opt out, but also argued that the settlement was not fair, especially with respect to the disparities between damages for class members under the formula and damages awarded the named plaintiffs in this and other specially-favored cases. Although we agree with petitioners that neither court below gave sufficient consideration to the issue of unfairness, allowing an opt out would provide an essential safety valve to help assure that named plaintiffs do not receive amounts greatly in excess of those accorded the rest of the class, since if they do, others will opt out and try for the same bargain.

The Eight Circuit affirmed, in a brief opinion which never addressed the opt out issue. The court of appeals took the position that an opt out was necessary solely to deal with the problem of personal jurisdiction over out-of-state class

---

[2]In addition to the disparity in damages awarded by the jury in *McNeil*, *supra*, note 1, the settlement agreement recognized that all players are not in equal bargaining positions and do not command equal wages. Thus, the agreement establishes categories of franchise and transition players who may be specially protected in the future, but only if they are paid, respectively, within the top 5 and top 10 players at their positions, which themselves are divided into eleven categories, with distinctions made between cornerbacks and safeties, and between defensive ends and defensive interior linemen, not to mention broader differences between offense and defense and linemen and backs. Settlement Agt. § VIII 7. Unlike those categories governing future situations, the payment formula for past damages treated all players, except those expressly excluded because they were parties to certain prior lawsuits, on the same basis, regardless of the position they played or their skill, based on prior salary or other measurement.

members. Since it found that petitioners either were subject to personal jurisdiction or had voluntarily entered the action, and hence waived any jurisdictional objection which might trigger an opt out, it believed that it did not need to reach the question of the effect of *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), in a case involving claims for both damages and injunctive relief.[3]

REASONS FOR GRANTING THE WRIT

1. As both petitions make clear, the decision of the district court refusing to allow class members with individual claims for money damages to opt out those claims is directly contrary to the ruling of the Ninth Circuit in *Brown v. Ticor Title Insurance Co.*, 982 F.2d 386 (1992). Since this Court granted review in *Ticor* to resolve the very issue presented here, but ultimately dismissed the petition as improvidently granted, over the dissents of three justices, 114 S. Ct 1359, 1362 (1994), and since the Court has not yet resolved that issue, review is plainly warranted.

If there were any question that the issues presented in both cases are the same, the brief *amicus curiae* filed by the NFL in *Ticor* contained a short summary of argument on page 3 removing any such doubt:

---

[3]Because both petitions demonstrate the error in this approach by the court of appeals, we address it only briefly. *Shutts* was not simply a case about the limits of the reach of state courts, but dealt more generally with the issue of when persons who were not named parties could be bound, as part of a class, in an action seeking money damages. Thus, we read *Shutts* as requiring the same notice and opt out rights for all non-parties, even those who reside in the forum state, in order to satisfy Due Process. For that reason, as well as those stated in the petitions, the attempt by the Eighth Circuit to avoid confronting the impact of *Shutts* in this case was unavailing.

> The history of the NFL's labor dispute with its players that culminated in the class action settlement in *White*, together with the procedural safeguards employed therein to protect the interests of absent class members, demonstrates that the Ninth Circuit's decision is overbroad and incorrect. The decision below: (i) adopts unwarranted and unprecedented new standards of due process where claims for injunctive relief predominate over claims for monetary relief; (ii) if affirmed, would render unconstitutional all mandatory federal class actions involving damage claims, thereby invalidating Federal Rules 23(b)(1) and (b)(2) in a large number of cases; and (iii) severely undermines the practical utility and policy goals of the Rule 23 mechanism. Accordingly, the Ninth Circuit's decision should be reversed.[4]

In addition to the cases cited by petitioners, the conflict among the circuits is deepened by the Fourth Circuit's decision in *In re A.H. Robins Co., Inc.*, 880 F.2d 709, in which this Court denied certiorari, with Justice White dissenting, 493 U.S. 959 (1989). Like this case, the claims

---

[4]We recognize that the NFL's *amicus* brief in *Ticor* (p. 11 n.7) argued that the two cases were distinguishable because no money was paid to class members in *Ticor*, whereas class members in this case received substantial payments, although less than petitioners believe they are entitled to receive. We admit the factual distinction, but fail to understand its relevance on the issue of whether members of either class had a right to opt out under Rule 23 or the Due Process Clause. Indeed, if anything, the lack of any payment in *Ticor* suggests that the case was only about injunctive relief, whereas there is no question here that the claims for money damages are substantial, measured both by the dollars at stake and the reasonable likelihood of success.

for money damages at issue in *Robins* had been certified as a class action under Rule 23(b)(1), with no right of opt out. While there are a number of factual and perhaps legal differences between that case and this, the opinion in *Robins* further evidences the confusion among the lower courts about the circumstances, if any, under which there may be a non-opt out class action involving claims for substantial money damages.

Finally, we note that other courts, particularly the Eleventh Circuit and the Ninth Circuit (consistent with its later expressed view in *Ticor*), have held, in direct contrast to the district court's reasoning here, that an expansive view of Rule 23(b)(1) in damage cases is an impermissible encroachment on the rights provided by Rules 23(b)(3) and (c)(2). *See, e.g., In re Dennis Greenman Securities Litig.*, 829 F.2d 1539, 1545 (11th Cir. 1987) (citing other cases, and noting "that if compensatory damage actions can be certified under Rule 23(b)(1)(A), then all actions could be certified under that section, thereby making the other subsections of the Rule meaningless, particularly Rule 23(b)(3)"); *McDonnell Douglas Corp. v. United States District Court for the Central District of Calif.*, 523 F.2d 1083, 1086 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).

2. Beyond the conflict in the circuits, review should be granted because the question presented is of special importance and the decision to deny petitioners the right to opt out violated Rule 23 and the Due Process Clause. Moreover, the decision to deny any opt outs was unnecessary to achieve the legitimate goal of assuring that the newly negotiated NFL rules governing terms and conditions applicable to player contracts would apply to everyone.[5]

---

[5]To the extent that petitioners argue that Due Process requires that they be entitled to opt out of the claims for injunctive relief, (continued...)

There are several means by which the district court and the parties here could have protected the rights of petitioners, consistent with Rule 23 and Due Process. First, two classes could have been certified: one for damages and the other for injunctive relief, with only the latter being mandatory. Second, one class could have been certified, but class members allowed to opt out solely with respect to their damages claims. Third, there could have been a class only for injunctive relief, and the damages claims could have proceeded in independent lawsuits, as apparently was intended when the case was filed, since, as noted above, the original complaint did not include a claim for money damages. What could not take place was what happened here: class members with damages claims were forced to

---

[5](...continued)
we disagree. However, we do agree that, especially because of the absence of an opt out, district courts must follow the mandate of Rule 23(c)(2)(C) and the Advisory Committee Notes to the 1966 Amendments to Rule 24, and allow class members to intervene and to take reasonable discovery to enable them to make their objections meaningful. Moreover, where there is no opt out, the courts must review proposed settlements with great care precisely because they bind all members of the class, in this case, all past, present, and future NFL players. Contrary to the suggestion made by the NFL in its *amicus* brief in *Ticor* (at 24 n. 20), extensive findings by the district court, adequate representation by class counsel, notice, an opportunity to be heard, and a fairness hearing are not "the functional equivalent of those [safeguards] provided by the opt-out provisions of Rule 23(b)(3)." *See Eisen v. Carlilse & Jacquelin*, 417 U.S. 156, 176-77 (1974) (finding of adequacy of representation not a surrogate for notice and opt-out rights under Rule 23); *cf. In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 1995 WL 223209 (3d Cir.) (fairness determination may not serve as surrogate for Rule 23 class certification findings). If they were equivalent, there would be no need for Rule 23(c)(2) to grant an express right to opt out, applicable only to classes certified under Rule 23(b)(3).

accept the terms negotiated by class counsel, with no right to negotiate or litigate on their own.

This result is first compelled by Rule 23. The drafters of the Rule made clear that, for individual claims for money damages, such as those at issue here, the right of opt out must be given. Surely, the mandatory notice and opt out rights in Rule 23(c)(2) cannot be avoided simply by relabelling a (b)(3) class as one under (b)(1) or (b)(2). Yet that is the impact of the ruling by the district court: the protections of Rule 23(c) can be overridden by use of Rule 23(b)(1). As noted above, we do not believe that claims for damages, as opposed to those seeking injunctive relief, can be brought under subdivision 1 since the problem to which that provision is addressed—situations where inconsistent verdicts leave the party opposing the class with conflicting primary obligations to class members—is simply not a problem when the relief sought is a judgment for money damages.

Nor do we agree with the district court that it is relevant whether the claims for injunctive relief "predominate" over those for damages for several reasons. Pet. App. 219-21. First, Rule 23(b)(3), not Rule 23(b)(1), uses the word predominate, and thus the concept of predominance has no place in the analysis of the scope of subsection (b)(1). Second, we doubt that predominance can be accurately measured, or that it is even a useful concept, in cases where there are substantial claims for both money damages and injunctive relief. The problem is greatly magnified in this case because, as noted above, there are class members, such as former players, who have no interest in injunctive relief and are seeking only money damages, and others, such as those who are still in college, who are not even eligible for monetary relief. Thus, even if the concept of "predominance" were a meaningful one in some situations, it seems clear that the predominance calculation here is not a unitary one for the class as a whole, but varies with each individual class member. Finally, to assume that

all claims could be properly certified under Rule 23(b)(1), would necessarily mean that the drafters of Rule 23 would have been willing to permit the denial of the right to opt out, after having insisted on it for all damages class actions brought under Rule 23(b)(3). That assumption is a very difficult one to accept, especially in light of the Due Process problems that such a construction of the Rules would raise, the issue to which we now turn.

The fundamental rule of law, embodied in the prohibition against deprivation of property without Due Process, is that no person may be deprived of a claim against another without a day in court. That is the message of the seminal case of *Hansberry v. Lee*, 311 U.S. 32 (1940), and that is the basis on which this Court had to examine the claims of the defendant in *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985), that Due Process prohibited a nationwide class from being maintained in state court.

There is, of course, an exception to the requirement that a person must be a party to a lawsuit before his or her rights can be affected where that person is part of a valid class. *Hansberry* teaches that adequate representation is a prerequisite, and *Shutts* teaches that at least adequate notice is also required. *See also Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The question that remains is, when is the right to opt out an essential element of Due Process? While we believe that *Shutts* strongly suggests an opt out is required whenever a class member has substantial claims for money damages, we do not contend that *Shutts* absolutely decided that issue, at least as applied to the facts of this case.

In *Shutts*, the defendant argued that the Due Process rights of out-of-state class members were violated by a nationwide class, but this Court rejected that claim, as applied to that class, where notice had been given by first class mail to each class member, the certified class excluded those to whom the notice could not be delivered, and each

class member was given the right to opt out. 472 U.S. at 801. Although there is language in the opinion from which it can be argued that the Court decided that an opt-out right is always required where there are claims for money damages, *id.* at 812, that was not the holding of *Shutts* since there a right to opt out had been granted.

In our view, the answer to the Due Process question presented here must be derived by looking to the three-part test established in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), for determining what process is due. As we spelled out in our *amicus* briefs in *Shutts* and *Ticor*, applying that test leaves no doubt that Due Process requires that individual claims for money damages of the kind possessed by petitioners here cannot be resolved by settlement of a class action or otherwise, unless the claimants are given the opportunity to litigate those claims with attorneys of their choosing, in a forum of their choosing.

The question of whether to apply the *Mathews* test, as both Public Citizen and the petitioners urged in *Ticor*, and how to apply that test in this context, are important questions which this Court should decide. Thus, in addition to the reasons offered in the petitions, the application of the *Mathews* test provides a further basis for granting review.

The question presented by the petitions, as restated in this brief, is by no means limited to the antitrust context. Indeed, the most likely area where the issue will be litigated is under Title VII of the Civil Rights Act of 1964, in particular the 1991 amendments to it. Prior to the amendments, only back pay was available for violations of Title VII, but now compensatory damages and a right to a jury trial have been added. Whereas formerly most employment discrimination cases were certified solely under Rule 23(b)(2), or perhaps under Rule 23(b)(1)(A), the availability of individual damages under Title VII now raises the issue of whether that past practice may continue, at least

without affording individual claimants a right to opt out on their damages claims.

Indeed, in *Ticor,* the Lawyers' Committee for Civil Rights under Law filed an *amicus* brief on this very question. It argued that Rule 23(b)(3) was not the only way to deal with cases in which there are claims for both injunctive and monetary relief, but conceded that cases that seek both injunctive relief and substantial damages under the civil rights laws would have to allow class members to opt out with respect to their damages claims. Brief at 19-20. Although cases of this kind under Title VII are just starting to move through the courts, a ruling in this case could provide much useful guidance, if not a definitive answer, to the question of how those cases should be handled.

Similar issues arise in the securities field, although perhaps with less frequency than in employment cases, since most securities claims seek money damages only, or at least primarily. Nonetheless, a ruling here would provide assistance to courts facing the problem in that context, and perhaps in others as well. Finally, as illustrated by *Shutts*, most states have provisions similar to Rule 23, and in any event are bound by the Due Process Clause. Therefore, a decision in this case would also be helpful to state courts in their handling of class actions.

CONCLUSION

For the foregoing reasons, and those set forth in the petitions, writs of certiorari should be granted in both cases, limited to the question as set forth in this brief.

Respectfully submitted,

Alan B. Morrison
(Counsel of Record)
Brian Wolfman
Public Citizen Litigation Group
Room 700, 2000 P Street NW
Washington D.C. 20036
(202) 833-3000

Attorneys for *Amicus Curiae*
Public Citizen, Inc.

May 22, 1995